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IN THE

Supreme Court of the United States

October Term, 1962

No. 1120.

O. C. LEE, individually, and J. C. LITSEY, individually, and both as representatives of Machinists employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

A. B. LEMASTER, individually, and A. P. ROTH, individually, and both as representatives of Electricians employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

K. L. PUTMAN, individually, and ROY FOWLE, individually, and both as representatives of the Pipefitters employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

FRANK WELLS, individually, and JOSEPH M. GORDON, individually, and both as representatives of Laborers employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957, — *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY; SYSTEM FEDERATION NO. 91 of the RAILWAY EMPLOYES DEPARTMENT, A.F.L.-C.I.O.;

HERMAN WEBB, President, System Federation No. 91; and

RAY ABNER, Secretary, System Federation No. 91; both as representatives of Said System Federation;

INTERNATIONAL ASSOCIATION OF MACHINISTS;

B. B. KIDWELL, General Chairman of said Association, and

JOHN W. HONADEL, President of Local No. 205 of said Association, both as representatives of said Brotherhood;

SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION;

CLIFFORD MCCUBBIN, President of Local No. 445, of said Association;

EDWARD A. CONNELLY, Local Chairman of Local No. 445, of said Association, both as representatives of said Association;

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;

ERNEST L. RYAN, President of Local Unit No. 1353 of said Brotherhood; and

HERMAN WEBB, General Chairman of said Brotherhood, both as representatives of said Brotherhood;

INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS;

RAY ABNER, General Chairman of said Association, and

HARRY SEARS, individually, President of Local No. 1004, both as representatives of said Association, - - *Respondents.*

Brief of Louisville and Nashville Railroad Company in Opposition to Petition For A Writ of Certiorari to the Court of Appeals of Kentucky.

OPINIONS BELOW.

The opinions below of the Jefferson Circuit Court and the Court of Appeals of Kentucky have not been officially reported. The opinion of the Jefferson Circuit Court is correctly reported in petitioners' appendix (1a-5a), as is the opinion of the Court of Appeals of Kentucky (9a-11a).

JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the Court of Appeals of Kentucky rendered November 2, 1962, rehearing denied February 22, 1963, by means of a writ of certiorari is contained in 28 U. S. C. §1257(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Does the Railway Labor Act preclude the maintenance of petitioners' suit brought specifically for a declaration of rights under collective bargaining agreements between the respondents, Louisville and Nashville Railroad Company and the Unions operating through System Federation No. 91 of the Railway Employes Department, A.F.L.-C.I.O., where, as here, petitioners have obtained an adverse award from the National Railroad Adjustment Board concerning the interpretation of the collective bargaining agreements?

2. Is petitioners' suit actionable as one based upon discrimination where, as here, the claimed discrimina-

tion by the Louisville and Nashville Railroad Company is based solely upon its alleged misinterpretation of the existing collective bargaining agreements, the precise issue decided adversely to petitioners by the National Railroad Adjustment Board?

STATUTES INVOLVED.

The pertinent provisions of the Railway Labor Act appear in the appendix, pp. 42b-43b, *infra*.

COUNTER-STATEMENT OF THE CASE.

The respondent, Louisville and Nashville Railroad Company (hereinafter called L&N), does not accept the petitioners' statement of the case. The L&N sets forth its own counter-statement of facts.

Petitioners filed this action against the L&N, System Federation No. 91 of the Railway Employes' Department, A.F.L.-C.I.O., several affiliated international and local labor organizations (hereinafter sometimes referred to as the "unions") and various officers of these labor organizations.

The named petitioners and those they purport to represent in this action are employees of the L&N (1b).[1] The labor organizations involved are the certified statutory collective bargaining representatives, under the Railway Labor Act (45 U.S.C. §151 *et seq.*), of the respective crafts and classes in which the petitioners are employed (1b, 7b-8b). Collective bargain-

[1]Numerals followed by letter "a" refer to petitioners' appendix. Numerals followed by letter "b" refer to pages of the L&N's appendix.

ing agreements were entered into between the L&N and the unions many years prior to 1957 covering "rates of pay, rules and working conditions" for the several crafts or classes of employees represented by the various unions, all in accordance with the provisions of the Railway Labor Act, and these agreements are still in effect (2b, 8b). These agreements contain, among other things, provisions relating to seniority of employees (2b-3b, 8b).

In accordance with the collective bargaining agreements, there has existed for many years on the L&N separate and distinct seniority districts for employees working in the South Louisville Roundhouse and for employees working in the South Louisville Shops (2b-3b, 8b). Separate seniority rosters were maintained by L&N for employees who worked in those separate seniority districts as set up in the agreements (3b-4b, 8b). The seniority of the employees at the South Louisville Roundhouse was purely geographical or what is known as point seniority, that is, their seniority did not entitle them to follow the work from one seniority district to another, and the Roundhouse district employees had no seniority right or right to work in the South Louisville Shops district (8b).

Effective at the close of work on February 17, 1957, all mechanical operations previously performed at the South Louisville Roundhouse were discontinued by the L&N and, as a result thereof, all employees engaged in the operations of the South Louisville Roundhouse were furloughed (4b, 8b). The South Louisville

Roundhouse has been torn down due to the entire dieselization of the railroad (18b, 22b).

It is apparent from the record that L&N interpreted the applicable collective bargaining agreements in effect between it and the unions as not authorizing the transfer of seniority rights of employees in the South Louisville Roundhouse district to the South Louisville Shops district. Prior to the making of this change in L&N's operations on February 18, 1957, the authorized representatives of all of the unions involved agreed with L&N's interpretation of the applicable collective bargaining agreements (4b-5b).

Some of the work that had been performed at the South Louisville Roundhouse prior to February 18, 1957 was, after that date, performed at the South Louisville Shops. Employees on the seniority roster of the South Louisville Shops were afforded the first opportunity to perform all the work necessary to be done at the South Louisville Shops, after which the employees on the roster of the South Louisville Roundhouse were afforded the opportunity to perform the remaining work at the South Louisville Shops with a seniority date of February 18, 1957 at that seniority point (9b). The South Louisville Roundhouse seniority rosters continue to be maintained so that, if mechanical operations are reestablished there, the employees on those rosters may perform such work at that seniority point in accordance with those seniority rosters (8b-9b).

The Roundhouse employees were dissatisfied because the seniority accumulated by them in the South

Louisville Roundhouse seniority district was not carried over by them into the seniority district of the South Louisville Shops and they protested to the railroad (5b, 9b). The right of the railroad to abolish the Roundhouse was conceded by petitioners, but they contended that it was violative of existing collective bargaining agreements not to "dovetail" or interweave their seniority with that of the employees whose names appeared on the seniority rosters of the South Louisville Shops on February 17, 1957, and that they had the right to work at the South Louisville Shops with the same seniority they enjoyed at the Roundhouse (9b, 26b). On April 23, 1957, the L&N, believing that its actions were strictly in accord with the applicable collective bargaining agreements, denied the claims of the petitioners (5b, 9b, 17b).

As required by the provisions of the Railway Labor Act (45 U. S. C. § 153), the petitioners submitted the dispute to the National Railroad Adjustment Board (5b, 9b, 11b-33b). Petitioners were represented by a well-qualified attorney in all their proceedings before the Adjustment Board. The contentions of the petitioners before the Second Division of the Adjustment Board are a part of the record here (11b-33b), as are the contentions of the L&N (33b-35b).

On June 30, 1958, the Adjustment Board issued its Award, No. 2899 in Docket No. 2787-I, which decided the dispute (11b-37b). The Board held (36b-37b):

> "Seniority rights, including rights to have seniority dovetailed, are created or extended solely

by contract or agreement negotiated between the carrier and the duly accredited representatives of the respective craft or class of employes.

"The record in Docket 2787-I discloses that no agreement provision for the dovetailing of seniority has been negotiated, or agreed to by the carrier and the duly accredited employe representatives. The seniority rules of the current collective agreement provide only for standard point seniority, which does not call for dovetailing of seniority when a point is closed or abolished.

"We find no merit in the contention of the claimants that the South Louisville Roundhouse was not in fact closed or in the contention that the closing of the South Louisville Roundhouse was in bad faith or a subterfuge. When a point is closed, the work theretofore performed at that point is often transferred to another point, and from all that appears in the record, that is what happened in these circumstances.

"The controlling agreement has not been violated."

On February 18, 1960, petitioners filed this action in the Jefferson Circuit Court in which they *specifically sought a declaration of their rights under the contracts between the L&N and the unions*, an accounting by the L&N for the wages and time lost by petitioners, and recovery of costs, expenses and counsel's fee in this proceeding. (5b-6b).

L&N filed its motion to dismiss the complaint or, in the alternative, a motion for summary judgment (6b-7b), and, in support thereof, L&N filed an affidavit,

with exhibits[1] thereto, executed by its Director of Personnel (7b-10b). The affidavit is uncontroverted.

On August 25, 1960, the Circuit Court handed down its written opinion in which it concluded that the Court lacked jurisdiction of the subject matter of the action (1a-5a). On September 12, 1960, judgment was entered dismissing the complaint, as amended (6a-7a). The judgment was amended October 6, 1960, for the sole purpose of adjudging the amounts in controversy (8a).

On November 2, 1962, the Court of Appeals of Kentucky affirmed the judgment of the Jefferson Circuit Court and adopted the written opinion of the Circuit Court (9a-11a). On February 22, 1963, the Court of Appeals of Kentucky denied a petition for rehearing (12a).

SUMMARY OF ARGUMENT.

The petition should be denied because the Jefferson Circuit Court and the Court of Appeals of Kentucky correctly decided the case and the decisions are not in conflict with applicable decisions of this Court.

Petitioners' entire argument is based upon erroneous statements throughout the petition that mechanical operations at the South Louisville Roundhouse

---

[1]The exhibits consisted of the submission made by both sides to the National Railroad Adjustment Board and the Board's Award No. 2899. The body of the submission filed by petitioners and by the L&N are copied at length in Award No. 2899. The submission filed by the employees is copied in the award under the headings "Claim of Employes", "Questions upon which an Award is Sought", "Employes' Statement of Facts", and "Position of Employes". The submission of L&N is copied under the headings of "Carriers Statement of Facts" and "Position of Carrier". These submissions and Award No. 2899 are made exhibits to the complaint by the amended complaint (Pet. 12-13).

were not discontinued. The Circuit Court correctly found that such mechanical operations were discontinued by the L&N in 1957 (1a), and this finding of fact is amply supported by the record.

First, the National Railroad Adjustment Board by its Award No. 2899, rejected petitioners' contentions that the South Louisville Roundhouse had not been closed by the L&N (36b), and petitioners have conceded (Pet. 12-13) that Award No. 2899 is a part of the record in this action. Secondly, evidence of this fact is also contained in the uncontroverted affidavit of W. S. Scholl (8b). The uncontroverted affidavit is also properly a part of the record for, where jurisdiction depends upon a question of fact, the Court should ascertain the facts and its judgment thereon is conclusive unless reversed in a direct proceeding. *Stgother* v. *Day*, Ky., 279 S. W. 2d 785; *Collings* v. *Duff*, Ky., 283 S. W. 2d 479. In passing upon a motion to dismiss for want of jurisdiction, as distinguished from a motion to dismiss for failure to state a cause of action, the Court is not limited to an allegation in a complaint, but it may consider evidence, including affidavits. Please see *Ramires & Feraud Chili Co.* v. *Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Calif.), aff'd. 245 F. 2d 874 (C.A. 9), cert. den. 355 U. S. 927; *Land* v. *Dollar*, 330 U. S. 731. Thirdly, petitioners' motion (37b-38b), by which they sought to have the Jefferson Circuit Court change its finding and to enter a finding that the Roundhouse had not been closed, was overruled (38b). The Roundhouse has even been torn down (22b), and petitioners have

conceded this much to be true (Pet. 13). In fact, in a supplemental brief filed in the Court of Appeals of Kentucky, counsel for petitioners, referring specifically to the South Louisville Roundhouse, stated (p. 8): "There is not even a side track left in that area where the men on the Roundhouse rosters could work."

In this action, the petitioners seek only a declaration concerning their seniority rights under the collective bargaining agreements in effect between the L&N and Unions (5b-6b). Petitioners were never discharged by the L&N (1b). There being no dispute concerning the relief sought and the status of petitioners as employees of the L&N, the law is well settled by this Court that the present suit is precluded by the Railway Labor Act (45 U.S.C. §153, *et seq.*) The Railway Labor Act vests exclusive primary jurisdiction in the National Railroad Adjustment Board to decide disputes involving the interpretation of collective bargaining agreements in the railroad industry. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Order of Ry. Conductors* v. *Southern Ry. Co.*, 339 U. S. 255; *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548.

Petitioners cite four Kentucky cases in support of their contention that the state court has jurisdiction to interpret the collective bargaining agreements: *Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Piercy* v. *Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *McGregor* v. *Louisville & N. R. Co.*, 244 Ky. 696, 51 S. W. 2d 953 (1932), and *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749 (1936).

The first three of the above cases were decided prior to the enactment of the 1934 amendments to the Railway Labor Act and all of them were decided prior to this Court's decision in the *Slocum* case, *supra*.

Numerous decisions from state and federal courts have applied the principle of the exclusive jurisdiction of the Adjustment Board announced by the Supreme Court in the *Slocum* and related cases. Please see, *e.g.*, *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65 N. W. 2d 736; *Brennon* v. *Delaware, L. & W. Railroad*, 303 N. Y. 411, 103 N. E. 2d 532, cert. den. 343 U. S. 977; *Isgett* v. *Atlantic Coast Line R. Co.*, 223 S. C. 56, 74 S. E. 2d 220; *Gainey* v. *Bro. Ry. Clerks*, 177 F. Supp. 421 (E.D. Pa.), affirmed 275 F. 2d 342 (CA 3), cert. den. 363 U. S. 811; *Spires* v. *Southern Ry. Co.*, 204 F. 2d 453 (CA 4); *Fingar* v. *Seaboard Air Line*, 277 F. 2d 698 (CA 5); *Broady* v. *Illinois Central R. Co.*, 191 F. 2d 73 (C.A. 7), cert. den. 342 U. S. 897; *Rose* v. *Great Northern Ry.*, 268 F. 2d 674 (C.A. 8); *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924.

Award No. 2899 of the Adjustment Board, not being a money award, is final and binding upon the employees and precludes the present suit. 45 U.S.C. § 153 First (m); *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. Petitioners' suit falls within neither of the two exceptions involving judicial review announced by this Court in the *Price* case: It is not an action instituted in federal court under 45 U.S.C. §153 First (p) to enforce an award. Neither is petitioners'

suit a direct attack upon the Board's award. Where it is claimed that the proceedings before the Board was a denial of due process of law, the award is subject to attack but, in such instances, the Board is an indispensable party to the suit. *Ellerd* v. *Southern Pacific R. Co.*, 241 F. 2d 541 (C.A. 7), cited with approval by this Court in the *Price* case; *Finlin* v. *Pennsylvania R. Co.*, 288 F. 2d 826 (C.A. 3); *Morrissette* v. *Chicago, B. & Q. R. Co.*, 299 F. 2d 502 (C.A. 7), cert. den. 369 U. S. 874.

Petitioners' attempt to evade the principles announced in *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*, *Pennsylvania R. Co.* v. *Day*, *supra*, and *Union Pacific R. Co.* v. *Price*, *supra*, by the argument that they are victims of discrimination. They rely upon such racial-discrimination cases as *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, none of which is remotely apposite to the present case. Those cases involved *hostile* and *invidious* discrimination—a discrimination based solely upon racial distinction. While we do not contend that hostile discrimination is limited to racial discrimination, we do insist that petitioners cannot avoid the principles so clearly announced by this Court in such cases as *Slocum*, *Day* and *Price* and obtain another interpretation of the existing collective bargaining agreements by the simple expedient of placing somewhere in the complaint a *naked* conclusion of discrimination.

The specific relief sought by petitioners is a declaration of rights as against the L&N, *under the contracts between the L&N and the Unions*, a declara-

tion of rights as between the petitioners and the Unions *as to the interpretation* of said contracts, an accounting for wages allegedly lost *due to L&N's allegedly erroneous interpretation of the agreements,* and recovery of costs, expenses and counsel's fee (5b-6b). The affidavits filed by petitioners (39b-41b) reveal most clearly that ". . . the action is one for a declaration of rights against defendant railroad and unions as to the interpretation of a contract as to plaintiff's and other's seniority rights and for an accounting for wages lost because of wrongful loss of seniority." Insofar as discrimination is concerned, the pleadings allege a mere conclusion of law and do not set forth any facts even tending to show arbitrary, capricious or discriminatory conduct on the part of respondents. Indeed, in their complaint (1b), petitioners *affirmatively* allege that they differ with the L&N ". . . only as to the interpretation of contracts as will hereinafter appear." It is anomalous that petitioners have asserted that the claimed discrimination is based upon L&N's alleged misinterpretation of existing collective bargaining agreements, the precise issue decided adversely to petitioners by the Adjustment Board, which Board, this Court held in the *Slocum* case, has exclusive primary jurisdiction to interpret such agreements, and whose decisions involving such an award as this are final and binding. *Union Pacific R. Co. v. Price, supra.* To adopt petitioners' theory of discrimination would be to destroy the principles of the *Slocum* and *Price* cases.

The *Steele* case and other discrimination cases cited by petitioners involve instances where employees were seeking to have a collective bargaining agreement declared *invalid*. It is true that the Adjustment Board has no jurisdiction to determine the validity of an agreement—its statutory function is that of interpreting such agreements. In the *Steele* case this Court was careful to point out that there were no issues ". . . as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." (323 U. S. 205). Please see, also, *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, 774. Petitioners here do not seek to have any collective bargaining agreements declared invalid. To the contrary, they rely, as they must, upon the existing agreements and seek only relief involving their interpretation.

Not only have the petitioners failed to allege any facts even tending to show that employees similarly situated were accorded unequal rights, but the pleadings, *affirmatively* reveal (3b-4b) that under the applicable collective bargaining agreements *separate* seniority rosters were required to be maintained and were maintained for Roundhouse employees and the employees of the South Louisville Shops, *a relevant distinction between these two groups of employees based upon the place of work*. Thus, it is conceded by petitioners (Pet. 4, 13) that the seniority rights of the Roundhouse employees are not the same as the seniority rights of employees at the South Louisville

Shops. Petitioners also concede (Pet. 38) that the existing agreements provided only for only standard *point seniority. Therein lies the relevant distinction between these two groups of employees.* There is nothing unlawful about the agreements which create the point seniority system and make the distinction, as here, between the seniority rights of the petitioners and the seniority rights of employees of the South Louisville Shops. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330.

The law is well established, from decisions of both state and federal courts, that merely by naming a labor union as a defendant and by adding *naked* charges of discrimination, fraud or collusion, an employee does not vest jurisdiction in the courts to determine a controversy which depends upon the interpretation of a collective bargaining agreement between a railroad and a labor union. Please see, *e.g.*, *Hippensteel* v. *System Federation No. 9*, 337 Mich. 251, 59 N. W. 2d 278 (1953); *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65 N. W. 2d 736 (1954); *Bennett* v. *Progress Lodge 992; Etc.*, 159 F. Supp. 93 (D.C. Mass.); *Rose* v. *Great Northern Railway Company*, 268 F. 2d 674 (C.A. 8); and *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924. This should be especially true where, as here, the pleadings *affirmatively* reveal a relevant distinction between the seniority rights of the two groups of employees based upon their place of work.

Other arguments advanced by petitioners to escape the impact of the Board's exclusive jurisdiction and its adverse award are completely lacking in merit.

The dispute is not a major dispute, as contended by petitioners. It involves nothing more than the interpretation of existing collective bargaining agreements which constitutes a minor dispute. *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711; *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30.

Nor is there any merit in petitioners' contention that the existing collective bargaining agreements precluded the L&N from discontinuing its mechanical operations at the South Louisville Roundhouse. It is apparent from its findings (36b-37b) that the Adjustment Board was aware that the L&N had discontinued such mechanical operations and the Board held that the agreements had not been violated (37b). In their submission to the Board, petitioners correctly conceded (26b) that the L&N had the right to abolish the Roundhouse. Please *cf. Street, Electric Ry. & Motor Coach Employees* v. *Greyhound Corp.*, 231 F. 2d 585 (C.A. 5); *United States Steel Corp.* v. *Nichols*, 229 F. 2d 396 (C.A. 6), cert. den. 351 U. S. 950; *New York Central R. Co.* v. *Brotherhood of R. Trainmen*, 140 F. Supp. 273 (N.D. Ohio), aff'd. 246 F. 2d 115 (C.A. 6), cert. den. 355 U. S. 877.

Petitioners appear to have erroneously assumed (Pet. 21-22) that the L&N could not lawfully discontinue its mechanical operations at the Roundhouse without the approval of the Interstate Commerce Commission for they rely upon Section 5(2)(*e*) of the

Interstate Commerce Act (49 U.S.C. Sec. 5(2)(c)) and cases involving that Act. Their reliance upon such authority is misplaced. Section 5(2)(c) applies only to mergers, consolidations and acquisitions *involving two or more carriers.* The L&N was not prohibited by any law from discontinuing its mechanical operations at the Roundhouse. It was strictly an internal change in its mechanical operations within the exercise of managerial prerogative and discretion.

Petitioners contend that their seniority rights are property rights under the Fourteenth Amendment to the Constitution of the United States and that the alleged impairment of their seniority rights presents a Constitutional question. Petitioners misconceive the nature of their seniority rights. There is no constitutional or statutory basis for their seniority rights. Seniority among employees is wholly contractual. *McMullans* v. *Kansas, Oklahoma & Gulf Rwy. Co.*, 229 F. 2d 50 (C.A. 10), cert. den. 351 U. S. 918; *Elder* v. *New York Cent. R. Co.*, 152 F. 2d 361 (C.A. 6); *Napier* v. *System Federation No. 91*, 127 F. Supp. 874 (W.D. Ky.); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924. It necessarily follows that the alleged violation of petitioners' seniority rights must be determined by the interpretation of the collective bargaining agreements, and this Court has clearly held that the Adjustment Board has *exclusive* primary jurisdiction to interpret collective bargaining agreements between a railroad and its employees.

Petitioners rely upon *Metal Polishers, Etc., Union* v. *Viking Equipment Co.*, 278 F. 2d 142 (C.A. 3) and *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (C.A. 2), cert. den. 368 U. S. 814, and contend that the transfer of work carries with it the transfer of seniority rights. However, these cases did not involve the Railway Labor Act and there is a vast distinction in the *procedure* for the resolution of disputes between that Act and the National Labor Relations Act or the Labor Management Relations Act. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, 31-32, note 2. Moreover, those cases are clearly distinguishable from petitioners' case on the *merits* for precisely the same reason given by Judge Miller in *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143 (C.A. 6), cert. den. 371 U. S. 941. Petitioners' seniority was acquired at and limited to the Roundhouse and the Adjustment Board properly held (36b-37b) that petitioners could not transfer their seniority to the South Louisville Shops, another separate seniority point.

The decision below is correct. No unsettled question of importance is actually presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

The Petition for a Writ of Certiorari Should Be Denied Because the Jefferson Circuit Court and the Court of Appeals of Kentucky Correctly Decided the Case and the Decisions Are Not in Conflict With Applicable Decisions of This Court.

It should be pointed out *in limine* that petitioners' entire argument is based upon the erroneous contention that the mechanical operations at the South Louisville Roundhouse were not discontinued. It is important to review the record in some detail in connection with such contention before discussing the basic issues of law involved.

The Jefferson Circuit Court expressly found that mechanical operations at the South Louisville Roundhouse were discontinued by the L&N in 1957 (1a):

> ". . . In 1957, the L&N discontinued at the Roundhouse the operations in which plaintiff employees worked, but offered the plaintiffs employment at the [South Louisville] Shops. The bargaining representative and the L&N reached the conclusion that plaintiffs would have to go to the foot of the roster in the South Louisville Shops."

The above finding by the Jefferson Circuit Court is amply supported by the record, as we proceed now to show.

First, the petitioners had contended before the Adjustment Board that the mechanical operations at

the South Louisville Roundhouse were not discontinued, but the Board rejected their contentions as shown by the following portions of its Award No. 2899 (36b):

> "The grievance herein involves consequences flowing from the closing of the South Louisville Roundhouse, a separate seniority point of the carrier. . . ."
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> * * * * * * *
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> "We find no merit in the contention of the claimants that the South Louisville Roundhouse was not in fact closed or in the contention that the closing of the South Louisville Roundhouse was in bad faith or a subterfuge. . . ."

The Board's finding that the South Louisville Roundhouse was closed is final and binding.[1]

Secondly, in the uncontroverted affidavit of W. S. Scholl, it is stated (8b):

> "Affiant further states that on or about February 17, 1957, all mechanical operations previously performed at the South Louisville Roundhouse were discontinued and, as a result thereof, it was necessary to furlough all employees engaged in the operations of said South Louisville Roundhouse."

Petitioners seek to avoid the effect of the above uncontroverted affidavit by contending (Pet. 12-13) that, since the Circuit Court dismissed for lack of

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[1]Please see 45 U.S.C. §153 First (m); *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. This is dealth with at pp. 32-38, *infra*.

jurisdiction, no facts may properly be considered except those stated in the complaint and amended complaint. We submit that the uncontroverted affidavit is properly a part of the record where, as here, the issue is one involving the jurisdiction of the lower Court.

Any Court, even *sua sponte*, has judicial power to determine its own jurisdiction in a particular case, and where such jurisdiction depends upon a question of fact, the Court should ascertain that fact; and its judgment ascertaining the fact is conclusive on the question of jurisdiction unless reversed in a direct proceeding. *Strother* v. *Day*, Ky., 279 S. W. 2d 785; *Collings* v. *Duff*, Ky., 283 S. W. 2d 179. In passing upon a motion to dismiss for want of jurisdiction, as distinguished from a motion to dismiss for failure to state a cause of action, the Court is not limited to allegations of a complaint but may properly consider proof *aliunde* the allegations of the complaint, including affidavits. Please see *Ramires & Feraud Chili Co.* v. *Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Calif.), aff'd. 245 F. 2d 874 (C.A. 9), cert. den. 355 U. S. 927; *Land* v. *Dollar*, 330 U. S. 731.

After the Jefferson Circuit Court had rendered its opinion in which it was expressly found that the mechanical operations at the South Louisville Roundhouse had been discontinued by the L&N in 1957, petitioners filed a motion to amend the Court's opinion (37b) and sought to have the Court make a finding that mechanical operations were not discontinued at

the South Louisville Roundhouse (38b). This motion of petitioners was overruled (38b).

The South Louisville Roundhouse has even been torn down (22b) and petitioners have even conceded this much to be true (Pet. 13). In fact, in a supplemental brief filed by petitioners in the Court of Appeals of Kentucky, they not only admitted that the South Louisville Roundhouse has been torn down but, referring specifically to the South Louisville Roundhouse area, counsel for petitioners stated (p. 8): "There is not even a side track left in that area where the men on the Roundhouse roster could work."

The Court of Appeals of Kentucky concurred in and expressly adopted the Circuit Court's opinion as the opinion of the Court of Appeals.[1]

There can be no question but that the petitioners have based their entire petition upon a factual basis which is contrary to findings made by the Jefferson Circuit Court, which findings are amply supported by the record. Moreover, petitioners previously had made the same allegations of facts before the National Railroad Adjustment Board (13b-25b) and they were expressly rejected by that Board (36b).

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[1]The opinion of the Court of Appeals was one rendered pursuant to its rule 1.310(b) which provides:

> "If the issues presented in a case do not involve any new or substantial point of law or any question of public importance the Court may direct that the opinion not be reported officially or cited as authority, which direction will be stated in the opinion and shall be noted by the Clerk on the docket. The opinions in such cases will not detail the facts and will dispose of the issues in a summary manner."

The Railway Labor Act Vests in the National Railroad Adjustment Board Exclusive Primary Jurisdiction to Decide Disputes Involving the Interpretation of Collective Bargaining Agreements in the Railroad Industry.

The complaint and the amended complaint *seek only a declaration of rights under the agreements between the L&N and the unions* representing the various crafts or classes in which petitioners are employed, an accounting for wages allegedly lost due to L&N's interpretation of the agreements, and recovery of costs, expenses and counsel's fee.[1] Petitioners and those they purport to represent in this proceeding are employees of the L&N, that is, the petitioners have not been discharged from the service of the L&N and the relationship of employer and employees continues to exist. Such being true, we submit that the law has been settled beyond dispute by this Court that the present suit is precluded by the Railway Labor Act (45 U.S.C. §153).

In 1934, the Congress of the United States amended the Railway Labor Act and, among other things, provided for a tribunal, known as the National Railroad Adjustment Board, for the specific purpose of deciding disputes arising out of the interpretation or application of collective bargaining agreements in the railroad industry. 45 U.S.C. §153 First (i) describes the type of disputes to be handled by the Adjustment Board as follows:

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[1]The nature of this suit and the specific relief sought are discussed in more detail at pp. 50-51, *infra*.

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

In proceedings before this Board, the "parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect." 45 U.S.C. § 153 First (j).

The only judicial proceeding *expressly* authorized by the Act after the rendering of an award by the Board is an enforcement suit in a United States District Court. 45 U.S.C. Supp. § 153 First (p).

After the enactment of the 1934 Amendments to the Railway Labor Act, questions arose as to what extent, if any, the 1934 Act affected the jurisdiction of the courts, both state and federal, to decide disputes between employees and railroads subject to the Act involving the interpretation or application of their collective bargaining agreements. In 1941, this Court decided *Moore v. Illinois Central R. Co.*, 312 U.S. 630, a case involving an alleged wrongful discharge of an employee. In the *Moore* case, this Court held that the

Railway Labor Act, as amended in 1934, did not preclude a common-law action in a state court for damages for wrongful discharge. It then appeared that the jurisdiction of courts was unaffected by the Railway Labor Act. However, the rule of the *Moore* case has been given a very limited scope, and subsequent decisions of this Court have expressly so stated.

One limitation upon the scope of the *Moore* case is set out in *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653. There, this Court held that a common-law action for damages for unlawful discharge was properly dismissed because the applicable State law requiring the exhaustion of administrative remedies had not been complied with.[1]

On April 10, 1950, this Court handed down two opinions involving the jurisdiction of state courts to interpret collective bargaining agreements in the railroad industry. In *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, the railroad had instituted a declaratory-judgment action in a New York state court for interpretation of collective bargaining agreements between the railroad and two labor unions. The state court interpreted the agreements and entered a declaratory judgment which was affirmed by the Appellate Divi-

[1] In the case now before the Court, petitioners allege that they all are employees of the L&N (1b); thus, their case is one not involving an alleged wrongful discharge. Moreover, Kentucky, unlike the Mississippi Court in *Moore* v. *Illinois Central R. Co.*, *supra*, requires the exhaustion of administrative remedies. Please see, for example, *Norfolk & W. Ry. Co.* v. *Harris*, 260 Ky. 132, 84 S. W. 2d 69, and *Tharp* v. *Louisville & N. R. Co., et al.*, 307 Ky. 322, 210 S. W. 2d 954.

sion and the Court of Appeals of New York. On appeal to this Court, the question presented for decision was stated as follows:

> "Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . .' The question presented is whether state courts have power to adjudicate disputes involving such interpretations when the Adjustment Board has not acted." (339 U. S. 240)

Thereafter, the Court held:

> "In this case the dispute concerned interpretation of an existing bargaining agreement. . . . in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board composed of representatives of railroads and unions. 48 Stat. 1189-1193. The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its Congressionally imposed functions. . . .
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> "The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in *Order of Conductors* v. *Pitney*,

supra [326 U. S. 561]. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents. . . .' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S. at 567, 568. *This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.*

"Our holding here is not inconsistent with our holding in *Moore* v. *Illinois Cent. R. Co.*, 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the *Moore* case does not conflict with this decision, and no contrary inference should be drawn from any language in the *Moore* opinion. It was error for the New York courts to uphold a declaratory judgment interpreting these collective-bargaining agreements." (339 U. S. 242-245; Emphasis added.)

In *Order of Ry. Conductors* v. *Southern Ry. Co.*, 339 U. S. 255, decided the same day as *Slocum*, the Court held that a South Carolina state court was without power to interpret the terms of a collective bargaining agreement because the Railway Labor Act conferred exclusive primary jurisdiction on the National Railroad Adjustment Board.

Petitioners cite several Kentucky cases in support of their argument that the Jefferson Circuit Court has jurisdiction to interpret the collective bargaining agreements: *Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Piercy* v. *Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *McGregor* v. *Louisville & N. R. Co.*, 244 Ky. 696, 51 S. W. 2d 953 (1932); and *Louisville and N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749 (1936). We point out that the first three of the above cases relied upon by petitioners were decided prior to the enactment by Congress of the 1934 Amendments to the Railway Labor Act and all of them were decided prior to this Court's decision in the *Slocum* case, *supra*.

Numerous state and federal courts have had occasion to apply the principle of the exclusive jurisdiction of the Adjustment Board announced by this Court in the *Slocum* case.[1]

In the recent case of *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548 (Decided June 29, 1959), this Court emphasized the principle established in the *Slocum* case. In holding that the Adjustment Board had exclusive primary jurisdiction of the claim of a retired railroad employee, the Court said:

> ". . . we have held that the National Railroad Adjustment Board had exclusive primary jurisdiction over disputes between unions and carriers based on the provisions of a collective bargaining agreement. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239." (360 U. S. 550)
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> "The National Railroad Adjustment Board was established as a tribunal to settle disputes arising out of the relationship between carrier and employee. All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are equally applicable when, as here,

[1] A few of these subsequent cases are: *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65 N. W. 2d 736; *Brennon* v. *Delaware, L. & W. Railroad*, 303 N. Y. 411, 103 N. E. 2d 532, cert. den. 343 U. S. 977; *Isgett* v. *Atlantic Coast Line R. Co.*, 223 S. C. 56, 74 S. E. 2d 220; *Gainey* v. *Bro. Ry. Clerks*, 177 F. Supp. 421 (E. D. Pa.), affirmed 275 F. 2d 342 (C.A. 3), cert. den. 363 U. S. 811; *Spires* v. *Southern Ry. Co.*, 204 F. 2d 453 (C.A. 4); *Fingar* v. *Seaboard Air Line*, 277 F. 2d 698 (C.A. 5); *Broady* v. *Illinois Central R. Co.*, 191 F. 2d 73 (C.A. 7), cert. den. 342 U. S. 897; *Rose* v. *Great Northern Ry.*, 268 F. 2d 674 (C.A. 8); *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924.

the employee has retired from service after initiating a claim for compensation for work performed while on active duty. . . . ." (360 U. S. 551)

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". . . Thus it is plain both from a reading of the Act in light of its purpose and the needs of its administration and from the settled administrative interpretation that the Board has jurisdiction over respondent's claim for compensation.

"Since the Board has jurisdiction, it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. . . . ." (360 U. S. 552)

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"Our decision in *Moore* v. *Illinois Cent. R. Co.*, 312 U. S. 630, does not stand in the way of this. The decision in that case has been given its proper, limited scope in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 . . ." (360 U. S. 553)

* * * * * * *

"Our consistent regard for the importance of having disputes between railroad employees and carriers settled by the administrative Board which Congress established for that purpose requires respondent to resort to the NRAB for adjudication of his claim." (360 U. S. 554)

We respectfully submit that it has been clearly established by this Court that the function of resolving disputes concerning the interpretation and application of collective bargaining agreements in the railroad industry has been given by Congress to the National Railroad Adjustment Board. The petitioners' claims fall within no recognized exception to this rule. Petitioners were represented by able counsel before the Adjustment Board, and they properly pursued the exclusive remedy available to them. *Slocum* v. *Delaware, L. & W. R. Co., supra; Pennsylvania R. Co.* v. *Day, supra.*

Award No. 2899 Is a Final and Binding Award and Precludes the Present Suit.

Petitioners contend that their submission of the dispute to the National Railroad Adjustment Board and the findings of that Board have no effect upon their right now to seek a judicial interpretation of the agreements in the Jefferson Circuit Court. We submit that their position is untenable.

Section 3 First (m) of the Act (45 U.S.C. § 153 First (m)) provides, in pertinent part, as follows:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, *and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.*" (Emphasis added.)

The question concerning the legal effect of an award of the Adjustment Board was before this Court in *Union P. R. Co.* v. *Price*, 360 U. S. 601, decided June 29, 1959. In that case a railroad employee who had been discharged submitted the grievance to the Adjustment Board, which found that his dismissal did not violate the collective bargaining agreement. After receiving this adverse award of the Board, the employee filed a diversity common-law action in a United States District Court to recover damages from the railroad for allegedly wrongfully discharging him in violation of the collective bargaining agreement. In holding that the adverse determination of the Adjustment Board precluded the employee from maintaining a suit, the Court stated:

> "Congress has said in § 3 First (m) of the Railway Labor Act that the Adjustment Board's 'awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' Respondent does not argue that a 'money award' is anything other than an award directing the payment of money. Indeed, it would distort the English language to interpret that term as including a refusal to award a money payment. Thus, the plain language of § 3 First (m), on its face, imports that Congress intended that the Board's disposition of a grievance should preclude a subsequent court action by the losing party. Furthermore, we have said of the Railway Labor Act that 'the specification of one remedy normally excludes another.' *Switchmen's Union of N. A.* v. *National Mediation Board*, 320 U. S. 297, 301. Thus, our duty to give effect

to the congressional purpose compels us to hold that the instant common-law action is precluded unless the over-all scheme established by the Railroad Labor Act and the legislative history clearly indicate a congressional intention contrary to that which the plain meaning of the words imports. Our understanding of the statutory scheme and the legislative history, however, reinforces what the statutory language already makes clear, namely, that Congress barred the employee's subsequent resort to the common-law remedy after an adverse determination of his grievance by the Adjustment Board." (360 U. S. 608-609)

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"Plainly the statutory scheme as revised by the 1934 amendments was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements. This grist of labor relations is such that the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board, past the action under § 3 First (p) authorized against the noncomplying carrier, see *Washington Terminal Co.* v. *Boswell*, 75 U. S. App. D. C. 1, 124 F. 2d 235, aff'd. by an equally divided Court, 319 U. S. 732, or the review sought of an award claimed to result from a denial of due process of law, see *Ellerd* v. *Southern Pacific R. Co.*, 241 F. 2d 541; *Barnett* v. *Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579, 582. So far as appears, all of the Courts of Appeals and District

> Courts which have dealth with this problem have reached the conclusion we reach here. . . ." (360 U. S. 616-617)

We submit that this Court has clearly held that such an award of the Adjustment Board as is involved in the present suit, that is, a non-money award, is final and binding and precludes litigation of the dispute in the courts with the exception of two types of cases. We propose now to examine the two exceptions and to show that the present litigation is clearly not embraced within either of the exceptions.

The first exception is an action expressly provided for by Section 3 First (p) of the Railway Labor Act (45 U.S.C. § 153 First (p)). That section authorizes a suit in a United States District Court to enforce an award against a non-complying carrier. Clearly, the present proceeding is not an enforcement suit.

The second exception involves judicial review of an Adjustment Board award where it is claimed that the proceedings before the Board amounted to a denial of due process of law. Please see *Ellerd* v. *Southern Pacific R. Co.*, 241 F. 2d 541 (C.A. 7), cited with approval by this Court in the *Price* case. In the *Ellerd* case, the Court made it clear that in such a suit, the Adjustment Board is an indispensable party. In other words, the second exception involves a *direct* attack upon the award with the Adjustment Board being an indispensable party to the suit. Unlike the *Ellerd* case, petitioners' suit is nothing but a *collateral* attack upon the Board's award. The petitioners here are in the

same position as those in *Fidler* v. *Pennsylvania R. Co.*, 288 F. 2d 826 (C.A. 3), where the Court said:

> "The appellants' wage claims were denied by the National Railroad Adjustment Board. By their complaint they seek a trial *de novo* in the court below on the ground that the Board has not afforded them procedural due process. . . ."
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>
> ". . . Even if it be assumed, however, that the appellants' position in this respect is correct, binding relief could not be granted in a case such as that at bar unless the Board be made a party to the action. See *Stranford* v. *Pennsylvania R. Co.*, D.C.D.N.J. 1957, 155 F. Supp. 680, 690, citing *Blackmar* v. *Guerre*, 1952, 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534. Since the Board is not a party to this action the court below was correct in dismissing the amended complaint."

In *Morrissette* v. *Chicago, B. & Q. R. Co.*, 299 F. 2d 502 (C.A. 7, 1961), cert. den. 369 U. S. 874 (May 14, 1962), several employees submitted a minor dispute to the Adjustment Board and their claims were denied. Thereafter, they filed a common-law action for damages based upon an alleged breach of the collective bargaining agreement. Their complaint was dismissed by the District Court, which held that the suit was precluded by *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. The dismissal of the suit was affirmed by the Court of Appeals and this Court denied certiorari. The Court of Appeals stated:

> "The District Judge accordingly presumed the awards to have been validly determined. In any

event, as the District Court opinion notes, it would have been improper to pass on the validity of the Board's award when the Board was not a party to this suit. *Ellerd* v. *Southern Pacific R. Co.*, 7 Cir., 1957, 241 F. 2d 541." (p. 503)

Petitioners also apparently seek to secure a judicial review of the adverse award of the Adjustment Board and evade this Court's ruling in the *Price* case by their references to the cases of *Edwards* v. *Capital Air Lines, et al.*, 176 F. 2d 755, and *Rychlick* v. *Pennsylvania Railroad Co.*, 229 F. 2d 171 (C.A. 2). (Pet. 40). Neither of those cases support such a conclusion.

In the *Edwards* case, the Court very carefully stated (176 F. 2d 762):

"We mean to make this decision no broader than the case. We are fully conscious that implications of more general doctrines seem to appear. But other holdings can await other cases. To emphasize the narrow limits of our present ruling, we point out that we are not dealing with a case where there was merely a dispute between a company and its employees, in which the union represented the employees; or with one in which the union assumed a bona fide neutral position in a dispute between employees. This case, we repeat for emphasis, concerns the rights of a few non-members of the union in a proceeding in which the union aggressively presented and pressed the claims of its members adverse to the claims of these appellant non-members, under a contract negotiated by the union, and before a board upon which two of the four members were union representatives. [A System Board of Adjustment cre-

> gated by an agreement between the carrier and the union]. The nub of the question is whether such a contract can make the award of such a board in such a proceeding immune from judicial examination. We hold that it cannot."

The case at bar is clearly distinguishable from the *Edwards* case, for in the present case the unions did not appear in the proceedings before the Adjustment Board—much less oppose these petitioners—but petitioners submitted their claims to that body of their own free will, represented by competent counsel, and without any hindrance or opposition by the unions.

In the *Ryehlick* case the Court rested its decision upon one single precedent or authority and stated (229 F. 2d 171):

> ". . . Although it is true that Edwards v. Capital Air Lines, 84 U. S. App. D. C. 346, 176 F. 2d 755, arose under other sections of the Act, its *ratio decidendi* applies so exactly to the case at bar that we adopt it as a precedent."

It must also be remembered that the *Ryehlick* case was reversed by this Court, 352 U. S. 480.

Clearly the present suit does not fall within either of the two exceptions set forth by this Court in the *Price* case. We respectfully submit that the present suit is precluded by this Court's interpretation of the Railway Labor Act. *Union Pacific R. Co. v. Price, supra.*

Petitioners' Suit is not Actionable as one Based Upon Discrimination Where, as Here, the Discrimination Asserted Against The Louisville and Nashville Railroad Company is Based Solely Upon Its Alleged Misinterpretation of Collective Bargaining Agreements, the Precise Issue Decided Adversely to Petitioners by the National Railroad Adjustment Board.

Petitioners seek to evade the principles announced by the Court in *Slocum v. Delaware, L. & W. R. Co.*, *Pennsylvania R. Co. v. Day*, *Union Pacific R. Co. v. Price*, and the other decisions we have cited in this brief by the argument that the petitioners are victims of unlawful discrimination. We vigorously disagree with petitioners' argument and earnestly insist that the complaint and amended complaint fail to state a cause of action against the L&N based upon discrimination, much less the *hostile* and *invidious* discrimination required for a cause of action by the cases relied upon by petitioners.

The specific relief sought by petitioners involves the *interpretation of existing collective bargaining agreements* (5b-6b). Insofar as discrimination is concerned, the pleadings allege a mere conclusion of law and do not set forth any facts upon which petitioners could base any charge of discrimination. Not only is there a complete lack of allegations of facts showing arbitrary and discriminatory conduct on the part of respondents, but petitioners conceded in their original brief filed in the Court of Appeals of Kentucky that they were without knowledge of any basis for their conclusion. Indeed, in their complaint (1b), petitioners affirmatively allege that rules differ with the L&N

"only as to the interpretation of contracts as will hereinafter appear." The charge of discrimination, unsupported as it is by any *facts* even tending to show arbitrary, capricious or discriminatory conduct, is a mere conclusion of law and fails to state a claim of hostile discrimination. *Pellicer v. Brotherhood of Ry. & S.S. Clerks*, 118 F. Supp. 254 (S.D. Fla.), aff'd. 217 F. 2d 205 (C.A. 5); *Fagan v. Pennsylvania R. Co.*, 173 F. Supp. 465 (M.D. Pa.); *Gainey v. Brotherhood of Ry. Clerks*, 177 F. Supp. 421 (E.D. Pa.), aff'd. 275 F. 2d 342 (C.A. 3); cert. den. 363 U. S. 811.

Petitioners cite several cases which they argue support their position regarding discrimination: *Steele v. L&N R.R. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood*, 323 U. S. 214; *Brotherhood of L.F.& E. v. Tunstall*, 163 F. 2d 289 (C.A. 4), cert. den. 332 U. S. 841; *Rolax v. Atlantic Coast Line R. Co.*, 186 F. 2d 473 (C.A. 4); *Graham v. Brotherhood of Firemen*, 338 U. S. 232; *Brotherhood of R. Trainmen v. Howard*, 343 U. S. 768; *Conley v. Gibson*, 355 U. S. 41. All of these cases are strikingly similar and none of them is even remotely apposite to the present case. Those cases clearly involved hostile and invidious discrimination—a discrimination based purely upon racial distinction. There is not even a suggestion that racial discrimination is involved in the present case. While we do not argue that hostile discrimination is limited solely to racial distinctions, we do insist that petitioners cannot avoid the principles clearly enunciated in the *Slocum* and *Price* cases and obtain another interpre-

tation of an existing collective bargaining agreement by the simple expedient of placing somewhere in the complaint a *naked* conclusion of "discrimination."

Not only are the pleadings completely lacking in any allegation of facts even tending to show that employees similarly situated were accorded unequal rights, but, in the Court of Appeals, we challenged petitioners to supply, even by brief, some ground forming a basis for discrimination. In a supplemental brief filed in the Court of Appeals, petitioners sought to supply the basis for discrimination which, in our opinion, only served to epitomize the complete lack of any proper basis for any charge of discrimination. In setting forth a formal statement of an issue of law in their supplemental brief, the petitioners stated:

> "The Railroad Company has violated the existing collective bargaining agreement—resulting in discrimination against Appellants. The Unions assented to this discrimination."

It is anomalous that the petitioners have asserted that the claimed discrimination is based upon L&N's alleged misinterpretation of an existing collective bargaining agreement, the precise issue decided adversely to petitioners by the National Railroad Adjustment Board, which Board, the Court has held has exclusive jurisdiction to interpret the agreement. *Slocum v. Delaware, L. & W. R. Co., supra*, and whose decisions involving such an award as this are final and binding. *Union Pacific R. Co. v. Price, supra.* To adopt peti-

tioners' notion or theory of discrimination would be to destroy the principles of *Slocum* and *Price*.

Petitioners also rely upon *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, 127 F. 2d 53 (C.A. 6). The *Teague* case was an early racial-discrimination case decided April 9, 1942, and was decided prior to the decision of this Court in *Steele* v. *L. & N. R. R. Co.*, *supra* (December 18, 1944). The holding of the *Teague* case has been vitiated by the later decisions of this Court in the *Steele*, *Tunstall*, *Graham* and *Howard* cases, *supra*, wherein the Court has held that such racial discrimination is hostile and invidious, is proscribed by the Railway Labor Act, and that an action to set aside such an agreement is within the jurisdiction of the federal courts. We submit that the *Teague* case no longer represents a sound expression of the law and it should afford no support for petitioners' arguments in the present case.

We do not dispute that the *Steele* and subsequent discrimination cases cited by petitioners hold that hostile and invidious discrimination of employees is proscribed by the Railway Labor Act, but those cases involved instances where the employee or employees were seeking to have a collective bargaining agreement declared *invalid*. The Adjustment Board has no jurisdiction to determine the *validity* of a collective bargaining agreement—its statutory function is that of *interpreting* such agreements, and this Court specifically stated in the *Steele* case that there were no issues "as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad

Adjustment Board" (323 U. S. 205). The clear distinction between an issue involving the validity of an existing agreement in the discrimination cases cited by petitioners and an issue involving an interpretation of an existing agreement was made equally explicit in *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, where the Court stated (p. 774):

> "Here, as in the *Steele* case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239. *This dispute involves the validity of the contract, not its meaning.*" (Emphasis added).

Petitioners do not seek to have any collective bargaining agreement declared invalid. To the contrary, petitioners rely, as they must, upon an existing collective bargaining agreement and seek only relief involving an interpretation of such an agreement. Remove from the petitioners' prayers the demand for the judicial interpretation of the agreement and no relief remains that could be granted against the L&N.

It is well established that seniority arises *only* out of, and has its scope determined by, the collective bargaining agreement—seniority rights are not inherent nor do they arise from mere employment alone without reference to the terms of an applicable collective

bargaining agreement. *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50 (C.A. 10), cert. den. 351 U. S. 918; *Elder v. New York Cent. R. Co.*, 152 F. 2d 361 (C.A. 6); *Napier v. System Federation No. 91*, 127 F. Supp. 874 (W.D., Ky.); *Ford Motor Co. v. Huffman*, 345 U. S. 330. It necessarily follows that the alleged violation of the seniority rights of petitioners must be determined by the interpretation of the collective bargaining agreement.

We have shown earlier in this brief (p. 5) that under the applicable collective bargaining agreements there has existed for many years separate and distinct seniority districts for employees working in the South Louisville Roundhouse and for employees working in the South Louisville Shops (3b, 8b). Separate seniority rosters were required to be maintained, and were maintained, by the L&N for employees who worked at these two separate locations (3b-4b, 8b). The Roundhouse district employees had no seniority right or right to work in the South Louisville Shops district and the employees of the South Louisville Shops district had no seniority right or right to work in the Roundhouse district (8b). Petitioners admit (Pet. 4, 13) that the agreements provided for such a point seniority system.

There is nothing unlawful about a collective bargaining agreement which provides for such a point seniority system. In *Ford Motor Co. v. Huffman*, *supra*, this Court stated:

> ". . . Inevitably differences arise in the manner and degree to which the terms of any nego-

tiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion ".

* * * * * * *

". . . Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, *may well include differences based upon such matters as the unit within which seniority is to be computed*, . . ." (345 U. S. 338-339; Emphasis added).

The point seniority system limits the accumulation of seniority to some specific place of employment and this may be as limited as being confined to a particular part of a shop or plant. This seniority system is distinguishable from a company-wide seniority system or what is commonly referred to as "system-wide" seniority. Each of these seniority systems has its advantages and its disadvantages to employees. Many employees prefer the point seniority system because they feel more secure in knowing that, under this seniority system, they cannot be displaced by other employees merely because the latter employees have been with the company much longer although at other points. Other employees, particularly those with many

years of service to a company, no doubt prefer system-wide seniority because they believe it inherently unfair not to be allowed to displace other employees, at different points, whose length of service to the company is less than their own.

However, irrespective of the relative advantages and disadvantages of the different systems of accumulating seniority, seniority is strictly a matter of agreement, and the particular collective bargaining agreements involved here provided for the point seniority system. The case now before the court itself reveals some of the advantages and disadvantages to employees of the point seniority system. In this particular instance, it was advantageous to the employees of the South Louisville Shops to have in effect under existing collective bargaining agreements a seniority system that protected their seniority standing within the South Louisville Shops. In this particular instance, the point seniority system operated to the disadvantage of some of the petitioners because, due to the very nature of this system of seniority which was provided for by the agreements, they could not lawfully displace any of the employees in the South Louisville Shops merely because some of the petitioners may have been in the service of the railroad for a longer period of time.

In *Steele* v. *Louisville and N. R. Co.*, *supra*, while the Court held that hostile and invidious discrimination among employees is impliedly prohibited by the Railway Labor Act, the Court was also careful to state:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, . . . are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." (323 U. S. 203)

The complaint and amended complaint herein fail to allege any facts tending to show that employees *similarly situated* were accorded unequal rights. These pleadings affirmatively reveal that under the applicable collective bargaining agreements *separate* seniority rosters were required to be maintained, and were maintained, for Roundhouse employees and the employees of the South Louisville Shops, *a relevant distinction based upon the place of work*, a common situation in the collective bargaining agreements in the railroad industry. Thus, it is conceded by the petitioners (Pet. 4, 13) that the seniority rights of the Roundhouse employees were not the same as the seniority rights of the employees of the South Louisville Shops. *Therein lies the relevant distinction between these two groups of employees.* There is nothing unlawful about the agreements which create the joint seniority system and make the distinction between the seniority rights of the Roundhouse employees and the employees of the South Louisville Shops. *Ford Motor*

Co. v. *Huffman*, *supra*. Furthermore, petitioners do not argue that the collective bargaining agreements are invalid. Instead, they rely upon the agreements and seek only their interpretation.

The record in the present case shows *only* that petitioners were adversely affected by the changes in the mechanical operations made on February 18, 1957—changes which, after the complete dieselization of the railroad, L&N could perform more economically and efficiently in its facilities at the South Louisville Shops. The mere fact that petitioners were adversely affected by the discontinuance of the facilities at the South Louisville Roundhouse is totally insufficient to support a conclusion of discrimination. This should be particularly true in such a case as this where, on their faces, the complaint and amended complaint *affirmatively* show the real and very relevant basis for distinguishing between the seniority rights of the two different groups of employees, that is, the point seniority system provided for by the existing and applicable collective bargaining agreements.

The law is well established, from decisions of both state and federal courts, that merely by naming a labor union as a defendant and by adding *naked* charges of discrimination, fraud or collusion, an employee does not vest jurisdiction in the courts to determine a controversy which depends upon the interpretation of a collective bargaining agreement between a railroad and a labor union. *Hippensteel* v. *System Federation No. 9*, 337 Mich. 251, 59 N. W. 2d 278; *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65

N. W. 2d 736; *Bennett* v. *Progress Lodge 992, Etc.*, 159 F. Supp. 93 (D.C. Mass., 1958); *Rose* v. *Great Northern Railway Company*, 268 F. 2d 674 (C.A. 8) and *Colbert* v. *Brotherhood of R. Trainmen*; 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924.

Other Arguments Advanced by Petitioners in Their Effort to Evade the Adverse Award of the National Railroad Adjustment Board are Completely Lacking in Merit.

While the basic argument advanced by petitioners in their effort to escape the impact of the Board's exclusive jurisdiction and its adverse award involves their unfounded reliance upon the discrimination cases discussed in the preceding part of this brief, several other contentions are intermingled throughout their petition without any separate designation of them having been made by petitioners.

A. The Dispute Over the Interpretation of the Collective Bargaining Agreements Was a Minor Dispute and Was Properly Referred to the National Railroad Adjustment Board.

Petitioners refer to the dispute as a "major" dispute (Pet. 26) and cite *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, and *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U. S. 284. Petitioners' reasoning appears to be that, under the existing collective bargaining agreements, the L&N is required to maintain the South Louisville Roundhouse and that it could do nothing to change the performance of mechanical operations at the South Louisville

Roundhouse without negotiating a change in the existing agreements. (Pet. 4, 19, 23, 24). Petitioners thus conclude (Pet. 26) that such negotiations for contract changes would have presented a major dispute. Petitioners state (Pet. 8) that they should have filed this suit promptly in 1957, and that there was no necessity of submitting such a dispute to the Adjustment Board. Indeed, petitioners' present counsel contend (Pet. 37-38) that the Adjustment Board had no jurisdiction to decide the dispute. We submit that such arguments are untenable.

This Court has held that two different types of disputes are embraced by the Railway Labor Act—major disputes and minor disputes. Major disputes are those arising from efforts to obtain an agreement and they involve the acquisition of new rights for the future, not the assertion of rights claimed to have vested in the past. Minor disputes, on the other hand, contemplate the existence of a collective bargaining agreement, and such disputes involve the meaning or proper application of a particular provision of the agreement to a specific situation. *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711; *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30.

The dispute between the petitioners and the L&N involves nothing more than an interpretation of existing collective bargaining agreements. The specific relief sought by petitioners is a declaration of rights as against the L&N *under the contracts between the L&N and the unions*, a declaration of rights as between petitioners and the unions *as to the interpreta-*

tion of said contracts, an accounting for wages allegedly lost *due to L&N's allegedly erroneous interpretation of the agreements*, and the recovery of costs, expenses and counsel's fee. Indeed, in their complaint (1b) petitioners dispel all doubt concerning the real basis of this suit by affirmatively alleging that they differ with the L&N "only as to their interpretation of contracts as will hereinafter appear." The affidavits of record (39b-41b) filed by petitioners reveal most clearly that "the action is one for a declaration of rights against defendant railroad and unions *as to the interpretation of a contract* as to plaintiff's and other's seniority rights and for an accounting for wages lost because of wrongful loss of seniority." (Emphasis added).

Even assuming, *arguendo*, that a major dispute is involved, as the petitioners contend, it avails petitioners precisely nothing because *it is well established that no court has jurisdiction to decide a major dispute, no power existing in any court to make an agreement for the parties.* Please see *Elgin, J. & E. Ry. Co. v. Burley, supra*, page 275, where, speaking of a major dispute, this Court stated:

> ". . . No authority is empowered to decide the dispute and no such power is intended unless the parties themselves agree to arbitration."

There can be no doubt whatsoever that the present dispute is one that has been classified as a "minor" dispute by this Court, since it involves a dispute over the proper interpretation of an existing collective bar-

gaining agreement, and the dispute was properly one within the exclusive jurisdiction of the National Railroad Adjustment Board.

B. Inherent in the Award of the Adjustment Board Is a Finding That the Existing Agreements Did Not Preclude the L&N From Discontinuing Mechanical Operations at the South Louisville Roundhouse.

Petitioners contend (Pet. 19, 23-24) that, since the collective bargaining agreements provided for the South Louisville Roundhouse as a separate seniority point, the L&N was required by the agreements to continue its mechanical operations at that seniority point. We disagree with such a contention.

First, we point out that, in their submission to the Adjustment Board (26b), petitioners properly conceded the right of the L&N to abolish the Roundhouse and stated:

> "3. Petitioners do not claim or contend that the carrier had no right to abolish the roundhouse and to consolidate the work theretofore done by roundhouse forces with the work theretofore performed by the South Louisville Shops forces. . . ."

It is apparent from its findings (36b-37b) that the Adjustment Board was aware that the L&N had discontinued its mechanical operations at the South Louisville Roundhouse and the Board held that the existing agreements had not been violated (37b).

Moreover, it is a patently erroneous interpretation of the collective bargaining agreements to assume that

the L&N could not discontinue its mechanical operations at a particular seniority point. To assume that the L&N could not discontinue a part of its mechanical operations because the agreements contained no express provision giving it that right is a manifest *non sequitur*. *Cf. Street, Electric Ry. & Motor Coach Employees* v. *Greyhound Corp.*, 231 F. 2d 585 (C.A. 5), where it is stated:

> "The agreement is silent on the precise question in issue. It provides for the exercise of seniority rights in case of 'reduction in forces', but nowhere defines this term or declares when such reductions are justified. On the other hand, there is no provision in the contract which may be construed as an explicit authorization for this action on the part of the employer.
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> * * * * * * * * *
>
> "The union argues that the recognition in the contract that there will be reductions in forces means only reductions to a point less than completely eliminating all the jobs in a classification, since to rule otherwise would allow the destruction of part of the very subject matter of the agreement. . . .
>
> "In prior ruling on the question, the cases are heavily on management's side. It is settled Florida law that if an employer discontinues a part of his business he is under no duty to pay wages to those workers left jobless by the change. *Amalgamated Ass'n. of Street, Electric Railway & Motor Coach Employees* v. *Tampa Electric Co.*, 47 So. 2d 13. The union argues that this situation is distinguishable from the case at bar, where

the operation was not suspended but was merely transferred to a third party. However, other cases more directly in point with the instant situation hold that the type of limitation on management's freedom of operation urged here will not be implied merely from the fact that the parties agreed on terms and conditions covering the jobs in question. . . ."

In *United States Steel Corp.* v. *Nichols*, 229 F. 2d 396 (C.A. 6), cert. den. 351 U. S. 950, the Court stated:

> "The relationship of master and servant or employer and employee is not dependent upon a collective bargaining contract. It has existed for innumerable years, long before the origin of the modern-day collective bargaining agreements. . . . The common law rights inherent in such relationship still exist except to the extent that they may be modified by legislation or by the specific contract between the employer and the employee. One of such common law rights is the right of the employer to select and hire his employees and to terminate the employment at will."

After pointing out that such a common law right is not abridged by legislation, the Court then looked to the collective bargaining agreement and stated:

> "Accordingly, instead of searching for a provision in the contract *authorizing* termination of employment by reason of age, we think it is necessary to determine from a consideration of the terms of the contract whether termination of employment by reason of age was *prohibited* by the contract. . . ." (Emphasis added).

In *New York Central R. Co.* v. *Brotherhood of R. Trainmen*, 140 F. Supp. 273 (N.D., Ohio), aff'd. 246 F. 2d 114 (C.A. 6), cert. den. 355 U. S. 877, the District Court stated:

> "We are of the opinion that the proposed closing of the Yard is a decision for management alone to make if, in the interest of efficiency of operation, service to the public or meeting competition, management should deem such a step advisable. We can envision any number of situations wherein management would decree a physical change in its method of operations either in its offices, its terminals, on its roadbeds, in its roundhouses, or in the operation of its trains, wherein the work of certain of its employees would be affected, and see no reason why management should be precluded from making these decisions in the interest of their company as well as of the public. Such decisions have been and are being made by public carriers as a matter of right and without consultation with their employees. To decree otherwise would bring about a violent disruption to our free enterprise system."

There was nothing at all in the collective bargaining agreements that prevented the L&N from discontinuing its mechanical operations at the South Louisville Roundhouse and, thereafter, having its mechanical operations performed at the South Louisville Shops.

C. The Interstate Commerce Act Did Not Preclude the L&N From Discontinuing Mechanical Operations at the South Louisville Roundhouse Without the Approval of the Interstate Commerce Commission.

Petitioners appear to have erroneously assumed (Pet. 21-22) that the L&N could not lawfully discontinue its mechanical operations at the South Louisville Roundhouse without the approval of the Interstate Commerce Commission, for they cite and rely upon the Interstate Commerce Act (49 U.S.C. § 5(2)(c)) and the following cases: *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, and *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U. S. 169. Petitioners' reliance upon such authority is misplaced. 49 U.S.C. § 5(2)(c) applies only to mergers, consolidations and acquisitions of control *involving two or more carriers*. It is inapplicable to instances, such as the one involved here, where the changes in mechanical operations involved no other carrier except the L&N.

Neither does *Interstate Commerce Commission* v. *Railway Labor Executives' Association, supra*, support petitioners. That case involved a proceeding before the Interstate Commerce Commission for authority, under Section 1(18) of the Interstate Commerce Act (49 U.S.C. § 1(18)), to abandon a line of railroad. It has no application to the type of tracks removed from the South Louisville Roundhouse area by the L&N.

The L&N was not prohibited by any law, state or federal, from discontinuing its mechanical operations at the South Louisville Roundhouse and, thereafter, having its mechanical operations performed at the South Louisville Shops. It was strictly an internal change in L&N's mechanical operations and was a mat-

ter for the exercise of managerial prerogative and discretion.

D. The Adjustment Board Had Jurisdiction to Decide the Dispute Involving the Seniority Rights of Petitioners and the Board's Award Did Not Purport to Decide Any Constitutional Question, Nor Is Any Constitutional Question Involved.

Petitioners argue that the L&N violated the collective bargaining agreements, thereby wrongfully destroying their seniority rights at the Roundhouse and that such accrued seniority is a property right (Pet. 19, 23-24). They appear to contend (Pet. 18-21) that the failure of the L&N and the unions to respect their property rights, namely, their accrued seniority, is in violation of the Fourteenth Amendment to the Constitution of the United States. Petitioners cite *Hill* v. *United Public Workers of America*, 314 Ky. 791, 236 S. W. 2d 887. Petitioners' argument, as we understand it, is that such a constitutional question is one for determination by the Court, not by the Adjustment Board.

We submit that the petitioners misconceive the nature of their seniority rights. Seniority among employees is wholly contractual. There is no constitutional or statutory basis for their seniority rights. Nor do seniority rights arise from a mere employment alone without reference to the terms of an applicable collective bargaining agreement. *McMullans* v. *Kansas, Oklahoma & Gulf Rwy. Co.*, 229 F. 2d 50 (C.A. 10), cert. den. 351 U. S. 918; *Elder* v. *New York Cent. R. Co.*, 152 F. 2d 361 (C.A. 6); *Napier* v. *System Federa-*

tion No. 91, 127 F. Supp. 874 (W.D. Ky.); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924. It necessarily follows that the alleged violation of petitioners' seniority rights must be determined by the interpretation of the collective bargaining agreements, and this Court has clearly held that the Adjustment Board has *exclusive* primary jurisdiction to interpret collective bargaining agreements between a railroad and its employees. *Slocum* v. *Delaware, L. & W. R. Co., supra; Pennsylvania R. Co.* v. *Day, supra*, and other similar cases earlier cited herein.

Hill v. *United Public Workers of America, supra*, lends no support to petitioners. The *Hill* case is distinguishable from the present case upon several grounds. First, the *Hill* case did not involve the Railway Labor Act but the National Labor Relations Act, and there is a vast distinction, in the procedures for the settlement of disputes, between the Railway Labor Act and the National Labor Relations Act. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, 31-32, note 2; *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 211, note 30.

Secondly, one of the primary questions involved in the *Hill* case was whether there was a collective bargaining agreement in effect. No question is presented in the present case concerning the existence of a valid collective bargaining agreement.

Lastly, interwoven with the question of the existence of a collective bargaining agreement in the *Hill*

case was the question of what union was the authorized representative of the employees. In the present case, the petitioners do not question that the respondent unions are the proper collective bargaining representatives for the making of collective bargaining agreements on behalf of the petitioners' crafts and classes of employees, and, if they had raised such a question, we point out that, under the Railway Labor Act, Congress has delegated to the National Mediation Board the exclusive jurisdiction for determining that question with no judicial review of its decision by the courts. *Switchmen's Union v. National Mediation Board,* 320 U. S. 297.

The speciousness of petitioners' claimed constitutional rights readily becomes apparent when it is realized that, carrying such a theory to its logical extreme, the Adjustment Board would never have jurisdiction to determine claims involving alleged contract violations—it could always be argued that accrued rights under existing agreements are vested property rights; that any interference with such property rights is in violation of the Constitution; and that the Board has no jurisdiction to decide such Constitutional questions.

E. All Disputes Involving Petitioners' Seniority Rights Under Existing Collective Bargaining Agreements Were Issues Within the Exclusive Jurisdiction of the Adjustment Board.

Petitioners contend (Pet. 37-39) that, assuming that the Adjustment Board had any jurisdiction at all con-

cerning their claims, the only decision or finding by the Board that could be final and binding is the finding that the collective bargaining agreements provided only for standard point seniority." The implication from petitioners' contention is that, since the Board decided only one issue involving their seniority rights under the agreements, the Jefferson Circuit Court has jurisdiction to decide all other issues involving the interpretation of the agreements.

We do not agree that the findings of the Adjustment Board are as limited as petitioners contend. However, we need not labor this point again here because, assuming, *arguendo*, that there are issues in the present case involving the interpretation of the agreements that were not submitted to or decided by the Board, petitioners cannot escape the principle that all such issues involving interpretation of the agreements, the sole source of their seniority rights, whether actually submitted to the Board or not, are nonetheless issues properly within the *exclusive* primary jurisdiction of the Board. Thus, if petitioners failed to submit any issues over the interpretation of the agreements to the Board, their failure to do so could not confer jurisdiction on the Jefferson Circuit Court to decide such issues.

On this theory, employees could skip completely the Board proceedings provided for and contend that, since the Board had not decided any of the issues involving the interpretation of an agreement, the Court has jurisdiction to decide them all.

F. Petitioners' Argument That Their Seniority Rights Follow the Transfer of Work to Another Existing Seniority Point and That the Court, Not the Adjustment Board, Must Determine Such an Issue, Is Without Merit.

Petitioners argue (Pet. 39-40) that courts have held that transfers of work carry with it the transfer of seniority rights of the employees. They rely upon *Metal Polishers, Etc., Union* v. *Viking Equipment Co.*, 278 F. 2d 142 (C.A. 3), and *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (C.A. 2), cert. den. 368 U. S. 814. These cases do not support the petitioners, for several reasons.

First, both of the cases involve agreements negotiated under the National Labor Relations Act or the Labor Management Relations Act. In *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, the Court stated (pp. 31-32, note 2):

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended 29 U.S.C. Sec. 151 et seq., 29 U.S.C.A. Sec. 151, et seq."

The Railway Labor Act created the Adjustment Board and gave it *exclusive* primary jurisdiction to interpret collective bargaining agreements between employers and employees covered by the Act. No similar board for this purpose was established or provided for in the National Labor Relations Act or the

Taft Hartley Act and, unless the employers and employees covered by the latter acts agree to arbitration, they may resort to the Courts for such interpretations.

Moreover, aside from this important *procedural* distinction, the two cases are distinguishable from the present case on the merits. The basic question involved in the *Zdanok* and *Metal Polishers* cases was whether the move of the entire company to a *new* plant rendered the *entire* collective bargaining agreement at the old plant inapplicable to the newly located plant in another city. The cases were decided upon the wording of the particular agreements there involved.

In *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143 (C.A. 6), cert. den. 371 U. S. 941, the Court held that the collective bargaining agreement in effect at the old plant in Detroit did not extend the employees' seniority rights to corresponding jobs in the *new* Tennessee plant to which the employer moved the entire company. Judge Miller properly distinguished the *Zdanok* and *Metal Polishers* cases, as follows:

> ". . . in that case [*Zdanok* v. *Glidden Co., supra,*] . . . there was no specific geographical limitation such as is contained in the agreement in the present case. In that respect the agreement in the *Glidden Company* case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case. In *Metal Polishers, etc.* v. *Viking Equipment Co.*, 278 F. 2d 142, C.A. 3rd, also relied upon by the plaintiffs, it appears that the new location of the plant involved was still within the geographical limits referred to in the collective bar-

gaining agreement, which, of course, is vitally different from the situation which we are considering in the present case."

In the present case the applicable collective bargaining agreements provided for only standard point seniority and petitioners' seniority was acquired at and limited to the South Louisville Roundhouse. We submit that the Adjustment Board specifically found that petitioners did not have the right to transfer their seniority to the South Louisville Shops, another separate seniority point (36b-37b).

CONCLUSION.

The decision below is correct. No unsettled question of importance is actually presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

Respectfully submitted.

JOSEPH E. STOPHER,

A. J. DEINDORFER,
1610 Kentucky Home Life Building,
Louisville 2, Kentucky,

H. G. BREETZ,

W. L. GRUBBS,

M. D. JONES,

JOSEPH L. LENIHAN,
L&N Office Building,
908 West Broadway,
Louisville, Kentucky,

Counsel for Respondent, Louisville and Nashville Railroad Company.

CERTIFICATE OF SERVICE.

I, H. G. Breetz, one of the attorneys for respondent, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of July, 1963, I served copies of the foregoing brief and following appendix on the several parties as follows:

1. On petitioners by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

Blakey Helm
606 Louisville Trust Building
Louisville 2, Kentucky

Joseph B. Helm
606 Louisville Trust Building
Louisville 2, Kentucky

2. On respondents, other than the Louisville and Nashville Railroad Company, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

Richard R. Lyman
741 National Bank Building
Toledo 4, Ohio

Robert E. Hogan
Kentucky Home Life Building
Louisville, Kentucky.

H. G. BREETZ